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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Administrative Review of Gray Portland Cement and Clinker From Mexico – August 31, 2002, through July 31, 2003

Summary

We have analyzed the comments and rebuttals of interested parties in the 2002-03 administrative review of the antidumping duty order covering gray portland cement and clinker from Mexico. As a result of our analysis, we have made changes to the margin calculations. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttals by interested parties:

1. Revocation
2. Regional Assessment
3. Sales-Below-Cost Test
4. Bag vs. Bulk
5. Swap Sales
6. Cash-Deposit Methodology
7. Ordinary Course of Trade
8. Ministerial Errors

Background

On June 22, 2004, the Department of Commerce (the Department) published the preliminary results in the administrative review of the antidumping duty order on gray portland cement and clinker from Mexico (Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico, 69 FR 34647 (June 22, 2004) (Preliminary Results)). The period of review (POR) is August 1, 2002, through July 31, 2003.

We invited parties to comment on our Preliminary Results.

Discussion of the Issues

Comment 1: Revocation

GCC Cemento, S.A. de C.V. (GCCC), argues that the Department should terminate this review and revoke the underlying antidumping duty order because the regional producers did not demonstrate support for the petition in this case. According to GCCC, the Department lacks the authority to impose antidumping duties on the basis of petitions that are not filed "on behalf of" the relevant industry. GCCC contends that, due to the statutory linkage of the statements "on behalf of" with "industry," the Department recognizes that the definition of industry is integral to resolving issues of standing. GCCC argues that a petitioner's standing to request antidumping relief and the Department's authority to give the relief depend in large part on how "industry" is defined.

According to GCCC, the statute provides two distinct definitions of "industry" – one for normal or national investigations and the other for special or regional investigations, such as this case. GCCC asserts that for national investigations the statute defines "industry" as the domestic producers as a whole of a like product or those producers whose collective output of the like

product constitutes a major proportion of the total domestic production of that product. GCCC contends that those producers accounting for either all or a major proportion of domestic production may qualify as the "industry." GCCC argues that the use of the disjunctive "or" confirms that the statute intends that either group of producers can be considered the national industry. GCCC asserts that, in contrast, the statutory provision defining the "industry" in regional markets does not include alternative definitions. GCCC asserts that, unlike the definition of national industry, there is no word such as "or" introducing an alternative definition. GCCC asserts further that, when dealing with the extraordinary exception of a regional industry, the Department is authorized only to treat the producers within each market as if they are a separate industry. According to GCCC, the word "they" in the statute can only mean all of the producers within each market; it does not mean "some" or "part" or a "major" or "minor" proportion.

GCCC argues that the language in the statute is consistent with the statutory provision setting out the requirements for finding material injury in a regional-industry case. According to GCCC, the plain language of section 771(4)(C) of the Tariff Act of 1930, as amended (the Act), requires petitions in regional-industry cases to be filed on behalf of the producers that account for "all, or almost all, of the production in the region." Because the antidumping duty order covering cement from Mexico was based on a petition that was unsupported by producers accounting for all or almost all of the region's production, GCCC contends, the Department issued the order in violation of U.S. law. GCCC disputes the Department's assertion in the twelfth review that it lacked authority to rescind the antidumping duty order on the basis that the petitioner's standing had not been challenged in connection with the original investigation such that the issue could

not be reviewed in the context of an administrative review. GCCC asserts that this view conflicts with both case law and the Department's own precedent. GCCC argues that the lack of standing to file an antidumping duty petition is a "jurisdictional" defect which parties may raise at any time. GCCC contends that the Department has the authority to revoke an order that never had the requisite level of industry support, citing Zenith Electronics Corp. v. United States, 872 F. Supp. 992 (CIT 1994) (Zenith Electronics), Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (CIT 1984) (Gilmore Steel), and Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541 (CAFC 1988) (Oregon Steel Mills).

Citing Oil Country Tubular Goods From Argentina and Cold-Rolled Carbon Steel Flat Products from Argentina: Preliminary Results of Countervailing Duty Administrative Reviews/Intent to Terminate Administrative Reviews, 61 FR 68713 (December 30, 1996) (OCTG from Argentina), GCCC argues that the Department's position is also contradicted by its decisions in other administrative reviews where the Department found a fundamental defect in its authority to collect duties. According to GCCC, the Department acknowledged in such cases its lack of authority in the context of an administrative review, terminated the review, and ordered the liquidation of the merchandise subject to review without regard to the duties in question.

The Southern Tier Cement Committee (the petitioner) comments that GCCC has raised this argument in prior reviews. The petitioner asserts that, considering the North America Free Trade Agreement (NAFTA) binational panel decisions pertaining to the 1992/1993, 1994/1995, and 1996/1997 administrative reviews that rejected GCCC's claims for revocation, it is long past time for GCCC to stop making this baseless argument.

The petitioner also argues that GCCC's claim is barred by the statute of limitations,

which, according to the petitioner, required any appeal of the decision to initiate the antidumping investigation to be filed within 30 days of the publication of the antidumping duty order. The petitioner argues further that GCCC's claim is barred by failure to exhaust available administrative remedies because the issue was not raised before the Department in the original investigation. The petitioner contends that GCCC's claim is barred by the doctrine of res judicata because it could have been raised, but was not raised, in an appeal to the Court of International Trade (CIT) from the Department's final determination in the original investigation. The petitioner argues that, to the extent that GCCC's claim is based on the unadopted recommendation of a General Agreement on Trade and Tariffs (GATT) panel, that recommendation does not constitute binding international law and there is no basis for applying the rule of statutory construction in Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (Charming Betsy). The petitioner cites Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 12764, 2765 (March 16, 1998) (1995-96 Final Results), Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 64 FR 13149, 13150 (March 17, 1999) (1996-97 Final Results), and Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 66 FR 14889 (March 14, 2001), in which the Department commented that panel reports under the 1947 GATT were not self-executing and had no legal effect under U.S. law and that neither the 1947 GATT nor the 1979 GATT antidumping code obligated the United States to establish industry support in regional-industry cases.

The petitioner concludes that the Department lacks authority under the statute to rescind its decision to initiate or to re-examine the issue of industry support in a review. Citing

Suramerica de Aleaciones Laminda, C.A. v. United States, 966 F.2d 660 (CAFC 1992) (Suramerica), and the 1995-96 Final Results, the petitioner asserts that the court has affirmed the Department's presumption of industry support in the absence of any showing to the contrary.

Department's Position: This is the thirteenth administrative review in which this issue has been raised and once again we reiterate our position that the issue of whether a petitioner has the necessary support to file a petition is strictly an investigation issue. The statutory deadline for parties to challenge the industry support for the petition was 30 days after the antidumping duty order was issued in 1990 (see section 516A of the Act). No party did so. As a result, the Department will not reconsider its industry-support determination. Further, the Uruguay Round Agreements Act (URAA) amended the statute to prohibit the Department from revisiting the issue of industry support once the Department has initiated a less-than-fair-value (LTFV) investigation. See section 732(c)(4)(E) of the Act. The bulk of GCCC's argument is a statutory argument that the Department applied the wrong standard for determining industry support in the investigation.[1] Because the statutory time limit to challenge this issue has passed and cannot be properly raised in this review, we have not addressed that argument.

Of the cases cited by GCCC, none of them supports the argument that the Department has the authority, in an administrative review under section 751(a) of the Act, to reach back over 14 years and reexamine the issue of industry support for the original petition. In Gilmore Steel, 585 F. Supp. at 673, the plaintiff contended that the Department lacked the authority to rescind the investigation based upon insufficient industry support for the petition after the 20-day period

[1]GCCC cites, in footnote 82 of its administrative case brief, a GATT Panel Report on Mexican Cement to support its argument pertaining to regional-industry provisions of the statute. That report was never adopted, however, by the GATT General Council.

established in section 732(c) of the Act had elapsed. In Zenith Electronics, 872 F. Supp. at 994, the plaintiff alleged that the petitioner was no longer a domestic "interested party" with standing to request an administrative review. Nothing in Zenith Electronics or Gilmore Steel supports GCCC's argument that a party may challenge industry support for a petition over 14 years after the fact and in the context of an administrative review under section 751(a) of the Act.

The case GCCC cites, Oregon Steel Mills, involved a challenge to the Department's authority to revoke an antidumping duty order based upon new facts, i.e., the industry's affirmative expression of no further support for the antidumping duty order. It was not based upon reexamination of the facts as they existed during the original LTFV investigation. The Court of Appeals for the Federal Circuit (CAFC) held that it was lawful for the Department to revoke an order, in the context of a "changed circumstances" review pursuant to section 751(b) of the Act, over the objection of one member of the industry. See Oregon Steel Mills, 862 F.2d at 1544-46. The CAFC did not state that industry support for an order must be established affirmatively throughout the life of an order. Indeed, the CAFC went to lengths to explain that it was not ruling on the claim that "loss of industry support for an existing order creates a 'jurisdictional defect.'" Id. at 1545 n. 4. As courts explained subsequently, the holding in Oregon Steel Mills is limited to the proposition that the Department may, but need not, revoke an order when presented with record evidence which demonstrates a lack of industry support for the continuation of the order. See, Suramerica, 966 F.2d at 666 and Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1085 (CIT 1988) (Citrosuco).

We also find GCCC's reliance on the administrative decision in OCTG from Argentina to be misplaced. Although GCCC states correctly that the Department terminated these

administrative reviews based on the Department's lack of authority to assess countervailing duties on subject merchandise entered after a certain date, this decision was necessitated by a decision by the CAFC which held that, once a country becomes entitled to an injury determination by virtue of its status as a "country under the Agreement" pursuant to the countervailing duty statute, the Department could not assess countervailing duties in the absence of an injury test. See Ceramica Regiomontana v. United States, 64 F.3d 1579, 1583 (CAFC 1995). The Department stated in OCTG from Argentina that, "at the time . . . Argentina qualified as {a country} under the Agreement, the assessment of countervailing duties on subsequent entries of dutiable merchandise became dependent upon a finding of subsidization and injury in accordance with section 701 of the Act." OCTG from Argentina, 61 FR at 68715. Thus, the Department concluded that it could not assess duties on entries after the date on which Argentina qualified for an injury determination. The issue of Argentina's entitlement to an injury determination after the issuance of the original order is in no way relevant or related to the petitioner's standing to file a petition.

In short, the cases GCCC cites are inapposite. None of them supports GCCC's argument that the Department has the authority, in an administrative review under section 751 of the Act, to reach back 14 years and reexamine the issue of industry support for the original petition.

Therefore, we reject GCCC's arguments that we lack the authority to assess antidumping duties pursuant to these final results of review and that we must revoke the underlying antidumping duty order.

Comment 2: Regional Assessment

Once again, GCCC argues that the Department should terminate this review and revoke

the underlying antidumping duty order. GCCC contends that, during the instant review, it sold cement both inside and outside the Southern Tier region, as defined by the U.S. International Trade Commission (ITC) in the original antidumping investigation. GCCC asserts that, in the Preliminary Results, the Department calculated duties on sales both inside and outside the Southern Tier region. According to the GCCC, the Department has no authority to assess duties on imports that do not affect the Southern Tier region, and the Department has an international obligation to limit its assessment of antidumping duties in regional cases only to the imports consigned for final consumption in that region. For a complete summary of GCCC's "Regional Assessment" argument, see GCCC's case brief dated July 22, 2004, at page 28.

The petitioner argues that GCCC's claims have no merit. The petitioner asserts that GCCC does not allege that the assessment of duties on a nationwide basis is in any way contrary to U.S. law but relies exclusively upon international trade agreements that date back to 1968. The petitioner asserts that, contrary to GCCC's argument, Congress has declared that the collection of antidumping duties on a region-specific basis is unconstitutional. According to the petitioner, Congress has crafted a set of statutory provisions that provides for the assessment of antidumping duties in regional-industry cases in a manner that is in accord with both the constitutional constraints and U.S. international obligations. In addition, the petitioner contends that these provisions and only these provisions form the body of law that governs the Department's antidumping determinations. The petitioner emphasizes that neither CEMEX nor GCCC appealed the Department's affirmative determination in the LTFV investigation to the appropriate court and within the statutory time limit for appeals with respect to the definition of "industry" in a regional case or the Department's alleged failure to offer an opportunity for a

suspension agreement during the original investigation. For a complete summary of the petitioner's rebuttal comment with regard to this argument, see the petitioner's rebuttal case brief dated July 30, 2004, at page 79.

Department's Position: As it has in prior reviews, GCCC continues to challenge the consistency of the Department's regional-assessment methodology with the GATT and the URAA. An administrative review conducted under the U.S. antidumping duty law is not the appropriate forum in which to raise such arguments. Pursuant to U.S. law, in conducting an antidumping duty administrative review, the Department must, first and foremost, make a determination supported by substantial evidence and in accordance with U.S. law. The appropriate topics of discussion in an administrative review concern the consistency of the Department's actions with respect to U.S. law and interpretations of facts on the record. Having not made such arguments, GCCC has raised nothing to which the Department may respond appropriately. As a general matter, however, we observe that the URAA was promulgated to implement the obligations of the United States pursuant to the Uruguay Round Agreements. We believe that the U.S. government has implemented its obligations properly.

Comment 3: Sales-Below-Cost Test

CEMEX, S.A. de C.V. (CEMEX) argues that, while it agrees with the Department's preliminary finding that it had no sales below cost, the Department's decision to initiate a cost investigation was unsupported by substantial evidence on the record and not in accordance with the law.

According to CEMEX, the statute requires the Department to have "reasonable grounds to believe or suspect" that below-cost sales have occurred before initiating a "sales below cost"

investigation and provides two bases for finding "reasonable grounds": (1) the Department has excluded below-cost sales of the exporter or producer from the determination of normal value in the most recently completed segment of the proceeding; or (2) an interested party provides specific information indicating that sales in the foreign market are at below-cost prices. CEMEX argues that neither decisions in prior administrative reviews of this case nor the petitioner's sales-below-cost allegation in the current administrative review provided grounds for the Department to determine that the statutory requirements for initiating a sales-below-cost investigation were met.

CEMEX argues further that, in light of the Department's findings in the eight previous reviews not to disregard any below-cost sales, the first basis to initiate a sales-below-cost investigation set forth above has not been met and that the Department should have been skeptical of the information submitted by the petitioner to fulfill the second basis. CEMEX also claims that the volume of alleged sales below cost was insubstantial and de minimis. CEMEX cites several decisions by the CIT and the U.S. Supreme Court recognizing the de minimis principle and the general principle that the law does not concern itself with small, insignificant, or trifling errors. CEMEX argues further that, by not setting a threshold quantity to initiate a sales-below-cost investigation, the statute permits the Department to use its discretion in determining what constitutes a reasonable basis to believe or suspect a respondent is selling merchandise in the home market below the cost of production. Finally, CEMEX argues that, in conducting this investigation, it incurs substantial expenses and the Department bears a substantial burden in analyzing and verifying the information. CEMEX argues therefore that the Department should establish a threshold quantity in determining what constitutes a reasonable

basis on which to conduct a sales-below-cost investigation.

GCCC argues that the petitioner did not provide a sufficient basis for requesting that the Department initiate a cost investigation, and that, as a result of the Department's initiation, as in the past eight administrative reviews, the respondents and the Department have expended resources needlessly on an unwarranted investigation of sales below cost. According to GCCC, given the consistent pattern in the past six reviews and this review of an allegation of de minimis below-cost sales, multiple submissions of cost data by respondents, and a decision by the Department not to disregard any sales below cost, the grounds for the Department to decline to initiate a sales-below-cost investigation have grown more compelling.

The petitioner contends that the Department should reject the respondent's arguments on the ground that they do not relate to any issue relevant to the final results of this review. The petitioner argues that, as it is too late for the Department to reverse its decision to initiate a cost investigation in this review, this issue is no longer relevant to these final results and, thus, the Department should reject respondent's arguments on that ground alone. The petitioner argues further that, as long as there is sufficient information that home-market sales were made below cost in this current review, it is irrelevant whether the Department excluded below-cost sales in prior reviews. According to the petitioner, the antidumping law indicates explicitly that, in deciding whether to initiate a cost investigation, the Department may not disregard a below-cost sales allegation on grounds that such transactions are purportedly de minimis and the statute does not establish any minimum quantity of sales that must be demonstrated to be below cost. Citing Huffy Corp. v. United States, 632 F. Supp. 50, 57-58 (CIT 1986), the petitioner argues that the statute requires only a showing that sales have been made at below-cost prices in order to initiate

a sales-below-cost investigation and that there is no requirement to show such sales were in substantial quantities. Rather, the petitioner asserts that the Department must only decide whether substantial below-cost sales were made in determining whether to disregard those sales.

Department's Position: Section 773(b)(1) of the Act requires that the Department have "reasonable grounds" to believe or suspect that below-cost sales occurred before initiating a below-cost investigation. See Statement of Administrative Action of the Uruguay Round Agreements Act, H.R. Doc.103-316, vol I, at 807 (1994) (SAA). Reasonable grounds exist when an interested party provides information indicating that sales have been made in the foreign market in question at below-cost prices. See section 773(b)(2)(A) of the Act. Based on our analysis of the information the petitioner provided to support its allegation of sales below cost, we found reasonable grounds to believe or suspect that below-cost sales occurred. The petitioner made use of the respondent's data on the record, employed a reasonable methodology, and provided evidence of below-cost sales. Upon examining the allegation, we found that the petitioner's analysis was consistent with our practice of examining sales below cost and determined that the petitioner had provided a reasonable basis to believe or suspect that the respondent was selling subject merchandise in Mexico at prices below the COP. See the memorandum from Mark Ross to Laurie Parkhill entitled "Gray Portland Cement and Clinker from Mexico: Request to Initiate Cost Investigation in the 2002/2003 Review," dated February 26, 2004.

In Connors Steel Company v. United States, 527 F. Supp. 350 (CIT 1981) (Connors Steel), the CIT determined that, when a petitioner provides reasonable evidence that home-market sales are being made below cost, the Department has a statutory duty to inquire further to

determine the validity of such an allegation. Further, in that decision, the CIT stated that the statutory "duty could not be avoided except for the most compelling reasons." See Connors Steel, 527 F. Supp. at 356. In this case, based on the petitioner's submissions, we found reasonable grounds to believe or suspect that below-cost sales occurred. Therefore, pursuant to section 773(b)(1) of the Act, we initiated a COP investigation to determine whether the respondent made home-market sales during the POR at below-cost prices. We reject the respondent's assertions that the petitioner's allegation is insufficient based on the number of below-cost sales identified. Section 773(b)(2) of the Act does not establish a threshold quantity of sales below cost in order for the Department to initiate a cost investigation. There is no threshold quantity of below-cost sales in order to initiate a sales-below-cost investigation because the petitioner, as a general matter, does not have access to a respondent's cost data in order to be able to demonstrate minimum percentages. If, based on available data, the petitioner can provide the Department with a reasonable basis to believe or suspect that any sales are being made below cost, the only way to determine whether the sales are being made at below-cost prices is to collect the data from the respondents and perform the calculations.

For the above reasons, we find that we initiated a below-cost investigation on the respondent's home-market sales properly.

Comment 4: Bag vs. Bulk

GCCC argues that, in comparing U.S. and home-market sales, the Department should not compare sales of bulk cement in one market with sales of bagged cement in the other market. GCCC agrees, however, that the Department's decision in the Preliminary Results to match sales of CPO 40 cement produced and sold in Mexico (all of which were made in bulk) to sales of all

types of cement sold in the United States, which included virtually all bulk cement, renders this issue moot in the instant review. Thus, GCCC submits that the Department need not address this issue in this review unless the Department changes its product-matching methodology for purposes of the final results of review.

The petitioner agrees that the issue of matching bulk and bagged cement is irrelevant given the Department's selection of CEMEX's sales of CPO 40 cement, all of which were in bulk, as the foreign like product for matches with sales of all cement types sold in the United States by CEMEX and GCCC. In any event, the petitioner reinforces its arguments in previous administrative reviews that the Department's practice of matching cement types sold in the United States and the home market without regard for packaging is consistent with the statute and the Department's longstanding, consistent practice in other cases.

Department's Position: As we have not altered our matching methodology from the Preliminary Results and because no party contested our matching methodology in this review, we find no reason to consider this issue for purposes of the final dumping calculation.

Comment 5: Swap Sales

The petitioner argues that CEMEX has overstated the U.S. price for certain transactions involving exchanges of cement with one of its unaffiliated U.S. customers during the POR. According to the petitioner, CEMEX reported an arbitrary price that bears no relationship to any real world value to certain swap transactions in this review. The petitioner asserts that by CEMEX's own admission, the values it assigned to the transactions in question are entirely arbitrary and do not even purport to represent a price that CEMEX received from its unaffiliated U.S. customer.

The petitioner argues further that in the absence of any information about the actual consideration CEMEX received for the transactions in question, the Department cannot simply accept any fanciful value that CEMEX chooses to enter into its records. Citing Freshwater Crawfish Tail Meat from the People's Republic of China: Preliminary Notice of Intent to Rescind New Shipper Administrative Review, 68 FR 52745, 52746 (September 5, 2003) (Crawfish), the petitioner argues that the Department in that case found U.S. sales not to be bona fide because, among other things, their prices were atypical of normal business practices. In addition, the petitioner asserts that CEMEX has provided no information on the record to justify the change in value for the transactions in question. The petitioner argues that the Department should assign the same value it assigned in the prior review for these types of transactions. The petitioner contends that because the Department verified this value in the prior review and it is a value that CEMEX has reported in this POR for most of its swap transactions, it is a reasonable surrogate for the actual consideration CEMEX received for such transactions.

The petitioner asserts that if the Department allows CEMEX to use the prices that it reported for the swap transactions in question, the Department will encourage CEMEX in future reviews to engage in creative bookeeping by concocting self-serving high values for the swap transactions in question that bear no resemblance to any actual value received by CEMEX.

The petitioner states that if the Department decides not to rely upon the standard price for the swap transactions in question, it instead should rely on record information regarding cement prices received by CEMEX in another geographic market where CEMEX conducts business. Specifically, the petitioner suggest that the Department should value these swap transactions at prices for U.S.-produced cement sold by CEMEX in a different geographic market.

CEMEX argues that the petitioner's assertion that the prices reported in the sales file for the transactions in question are arbitrary values that have no real-world validity is erroneous. CEMEX contends that just as for the other swap transactions, the reported prices for these transactions were taken directly from its books and records which were kept in the normal course of business. Thus, according to CEMEX, the reported prices for the challenged transactions are just as valid as the prices reported by CEMEX for all other swap transactions.

CEMEX argues that the petitioner's reliance on Crawfish is inapposite because the prices in that case were found to be atypical of normal business practices whereas the prices reflected for the transactions at issue were based upon the prices CEMEX recorded in its records in the normal course of business.

CEMEX argues further that the petitioner's alternative argument that the Department should value the challenged transactions at prices received by CEMEX in another geographic market where CEMEX conducts business is equally without merit. According to CEMEX, the petitioner is asking the Department to value Mexican cement transferred in Arizona, not on the basis of prices for Mexican-produced cement, but rather on the basis of prices for U.S.-produced cement sold in a totally different geographical market. CEMEX argues that such an approach would be contrary to the statutory requirement in the U.S. antidumping law that export price and constructed export price be based on the price of the subject merchandise (i.e., Mexican produced cement). CEMEX argues that the petitioner has not provided, and cannot provide, any statutory support or administrative precedent for its argument that the price here be based on the price of U.S.-produced cement.

CEMEX requests that the Department follow the precedent established in the prior

administrative review and value the transactions in question at the prices reflected in its books and records.

Department's Position: The difference between U.S. non-swap sales and the swap sales in question in terms of average net prices is insignificant. We find no merit in the petitioner's assertion that the prices CEMEX reported for the swap transactions in question bear no relationship to "real world value." For a detail discussion of our analysis of prices regarding swap sales and non-swap sales, see Final Results Analysis Memorandum dated December 20, 2004 (Final Analysis Memo).

Further, we have no reason to believe, and there is no evidence to support, a conclusion that CEMEX reported the prices for the swap transactions in question inappropriately. The Department requested further clarification in its March 25, 2004, supplemental questionnaire regarding the prices reported by CEMEX for the swap transactions in question. In its supplemental response dated April 27, 2004, at pages 60 and 61, CEMEX provided a further explanation of why it reported different prices for these swap transactions. We have no information on the record of this administrative review to indicate that the prices for the swap transactions in question were inappropriately reflected in the company's books and internal records. Thus, for the final results of this administrative review, we have used the price CEMEX reported for its swap transactions.

We see no merit to the petitioner's recommendation that we rely on record information regarding cement prices received by CEMEX in another geographic market. The petitioner's recommendation is not supported by the statute and therefore, it would be inappropriate to value subject merchandise on the basis of prices for U.S.-produced cement. See section 773 of the Act,

which states that a fair comparison shall be made between the export price or constructed export price to normal value.

Comment 6: Cash-Deposit Methodology

CEMEX argues that the Department's reasons for departing from its standard cash deposit methodology are erroneous and does not justify the change in methodology in this case. Specifically, CEMEX asserts that the cash deposit is not intended to be an accurate measure of the assessed duty. According to CEMEX, the statute requires only cash deposit estimates, not absolute accuracy. CEMEX argues further that these estimates need only be reasonably correct pending the submission of complete information for an actual and accurate assessment. Citing Koyo Seiko Co., Ltd. v. United States, 110 F. Supp. 2nd 934, 942 (CIT 2000), affirmed 258 F.3rd 1340 (CAFC 2001) (Koyo), CEMEX argues that the CIT has consistently rejected efforts to require more precision in the cash deposit rate.

CEMEX argues that the pattern of difference between the weighted-average margins and the assessment rates that the Department observed arises naturally in most cases involving an affiliated importer and constructed export price due to the normal differences between the entered value and sales value. CEMEX asserts that in such cases, because the sale of the subject merchandise to the first unaffiliated customer occurs after importation, the entered value represents the transfer price set between the exporter and the affiliated importer. CEMEX asserts further that the price at which the merchandise is later sold to an unaffiliated customer generally reflects a mark-up added by the affiliated importer. CEMEX contends that the facts of this case are no different from the countless administrative reviews and investigations involving constructed export price in which the Department applied its normal ad valorem cash deposit

practice. CEMEX argues that this case does not present any exceptional facts to warrant any deviation of it normal practice.

CEMEX asserts that there is no undercollection of duties because Section 737 of the Act provides that any difference between deposited and assessed duties will be collected or refunded with interest. According to CEMEX, this provision ensures that the U.S. government does not suffer a loss from an underestimate of antidumping duties. CEMEX contends that, on the other hand, the over collection of duties imposes a significant financial burden upon the importer because its funds must remain tied up for a lengthy period of time.

CEMEX contends that by changing the deposit requirement for future entries, the Department essentially assumes that the difference between the entered value and the U.S. price will remain constant in future review periods. CEMEX argues that no evidence on the record supports such a finding and the courts have repeatedly rejected such a assumption. Citing Federal-Mogul Corp. v. United States,813 F. Supp. 856, 868 (CIT 1993), CEMEX argues that the CIT specifically rejected the argument that calculating cash deposit rates as a percentage of entered value, rather than as a percentage of sales value, would result in a more accurate estimate of the assessed duty. According to CEMEX, the court held that it is by no means true that the adjusted U.S. price of the future entries would indeed be increased in the same proportion as in the final results of this review. CEMEX contends that the court upheld the Department's standard cash deposit practice without any conversions to account for the differences between the entered value of the merchandise and the adjusted U.S. price to be determined in the future.

CEMEX asserts that the Department's departure from its normal cash deposit practice is arbitrary because there is no reasonable basis for such departure. CEMEX contends that well-

established principles of administrative law require that the Department must adhere to its prior policies and practices, or provide a reasonable explanation for such change. CEMEX argues that in previous administrative reviews of this order, the Department consistently utilized its normal ad valorem methodology and rejected the petitioner's request to apply a per-unit deposit amount. According to CEMEX, the only instance of deviating from its practice has occurred in cases where the entered value was inaccurate or incomplete. CEMEX asserts that in previous reviews (prior to the 2001/2002 administrative review) the Department specifically declined to use a per-unit cash deposit amount because it found no problems with the entered value in those reviews. CEMEX contends that in this review, there was no change in the facts from those of the earlier review periods and there is no evidence showing that this case differs in any way from other cases. Thus, according to CEMEX, the Department's change in practice is inappropriate because it is not supported by a reasonable explanation why this case should be treated differently from other cases.

The petitioner argues that the Department correctly used a cash deposit rate based on dollars per metric ton cash for future entries of the respondent, rather than an ad valorem rate. The petitioner asserts that the Department's finding of a pattern of differences between the weighted-average margins and the assessment rates in recent reviews is fully supported by evidence on the record. The petitioner asserts that, in fact, from the ninth review to the thirteenth review, the assessment rate has consistently been different than the ad valorem cash deposit rate. The petitioner contends that, as a result, the application of an ad valorem cash deposit rate to future entries of cement from Mexico would plainly result in the undercollection of cash deposits relative to the antidumping duties that ultimately will be assessed upon liquidation of the entries.

The petitioner contends that the gross discrepancy between the assessment rate and the ad valorem cash deposit rate is not a coincidence, but the result of the respondent's aggressive understatement of entered values for the purpose of decreasing its liability for cash deposits of estimated antidumping duties. According to the petitioner, the respondent has admitted that its entered values reflect an arbitrary transfer price, not the arm's- length price between unaffiliated buyers and sellers preferred by the customs law. The petitioner asserts that the respondent and its affiliated U.S. importers have distorted the transfer price in a way that yields an undercollection of cash deposits. The petitioner argues that the resulting shortfall in the collection of cash deposits provides the respondent and its affiliated U.S. importers a substantial, improper economic benefit.

The petitioner asserts that the use of an ad valorem cash deposit rate that grossly undercollects the estimated antidumping duties does not serve the fundamental purpose of the statutory cash-deposit requirement of providing security for final assessment and immediate relief from dumped imports. The petitioner contends that the requirement that importers pay cash deposits was meant to provide an additional deterrent to dumping by increasing the immediate financial burden on exporters and importers upon entry of merchandise subject to an antidumping duty order. Thus, according to the petitioner, cash deposits serve as security for monies that may be owed once entries of subject merchandise are liquidated.

The petitioner argues that the Department's choice of methodologies for calculating cash deposit rates and antidumping duty assessment rates is not restricted by the statute, regulation, or case law. Citing the respondent's May 5, 2003, brief to the NAFTA Panel in the 1999/2000 administrative review, the petitioner contends that even the respondent agrees that the statute

does not bind the Department to any specific calculation methodology and that it is well established that the Department has a substantial amount of discretion in establishing the cash deposit rate methodology.

Citing Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Administrative Review, 67 FR 63877, 63886 (October 16, 2002) (Freshwater Crawfish), the petitioner argues that the use of the dollars per-metric ton methodology is supported by the Department's precedent in other cases. The petitioner argues further that the Department has used quantity-based methodologies for determining the assessment rate. According to the petitioner, in the 1997/1998 administrative review, the Department discovered that the respondent had erroneously reported gross invoice values rather than net entered values. Thus, the petitioner asserts, the Department could not follow its normal practice of calculating an assessment rate using total entered value in the denominator.

The petitioner states that the respondent provides no reason why the Department should not rely on the dollars per ton methodology, rather than an ad valorem methodology, to determine the cash deposit rate in light of the great discrepancy in this review and prior reviews between the ad valorem cash deposit rate and the assessment rate and between the entered value and the U.S. sales price. The petitioner argues that the respondent's argument that the cash deposit rate is not intended to be an accurate measure of the assessed duty is simply erroneous. The petitioner asserts that, to achieve their remedial purposes, cash deposits must provide a reasonably correct estimate of the duties that will ultimately be assessed.

The petitioner argues that the evidence on record compels the Department to reach the conclusion that failure to use a different methodology for the cash deposit rate would result in the

undercollection of estimated antidumping duties. The petitioner asserts that for the final results, the Department should continue to calculate cash deposit rates for future entries of subject merchandise using the dollars per-metric ton methodology.

Department's Position: For the reasons stated in the Preliminary Results, we affirm our decision to apply a per-unit cash-deposit amount of $32.85 per metric ton to entries of subject merchandise from CEMEX/GCCC following the publication of these final results of review. See Final Analysis Memo. The record evidence indicates that a pattern of significant differences exists between the weighted-average margins and the assessment rates. See Preliminary Results Analysis Memorandum dated June 17, 2004, at attachment 3. Contrary to the respondent's assertion, this pattern of differences indicates that the collection of estimated antidumping duties using a rate based on net U.S. price results in the undercollection of estimated antidumping duties at the time of entry. Consequently, the undercollection of estimated antidumping duties does not serve the fundamental purpose of the statutory cash-deposit requirement of providing security for final assessment and immediate relief from dumped imports. Therefore, we continue to find that the per-unit assessment figure we have calculated represents a more accurate reflection of the estimated antidumping duties.

While we agree with the respondent that cash deposits and assessment rates need not be identical, we find that deposit rates should be as accurate as reasonably possible (as also indicated by the Court in Koyo). In this case, because there is a significant disparity between the cash deposit amount and the assessment rate, it is appropriate to apply a per-unit assessment figure in order to calculate a more accurate estimation of the duty amount that will ultimately be assessed. (emphasis added)

We disagree with the respondent's assertion that by changing the deposit requirement for future entries, the Department essentially assumes that the differences between the entered value and the U.S. price will remain constant in future review periods. Our decision to apply a per-unit cash-deposit amount is solely based on evidence on the record that indicates a significant disparity between the cash deposit rate and the duty assessment rate. Thus, our decision to adopt this methodology did not hinge on the belief that the Department could forecast the amount of dumping on future entries.

As the petitioner points out, the statute does not bind the Department to any specific calculation methodology and the Department has discretion in establishing the cash deposit rate methodology. Therefore, the application of a different methodology as a result of this review does not render our methodology inconsistent with the statute. See Federal Mogul Corp. v. United States, 918 F. Supp. 386, 404 (CIT 1996).

While we agree with the respondent that our normal practice is to calculate the cash-deposit rate on an ad valorem basis, we find that the pattern of significant differences between the weighted-average margin and the assessment rates warrants a deviation from our standard practice. Upon completion of this review, we will direct U.S. Customs and Border Protection (CBP) to apply the resulting quantity-based amount against the quantity of subject merchandise entered by the importer to satisfy the cash-deposit requirement.

Comment 7: Ordinary Course of Trade

GCCC argues that the Department's determination that its sales of CPO30R BRA cement were not in the ordinary course of trade was based on erroneous conclusions with regard to sales volume, profitability, customers, and shipping costs. GCCC argues that these sales were in the

ordinary course of trade as defined by the statute and interpreted in the Department's prior decisions and, consequently, that the Department should match GCCC's Type II sales in the United States with GCCC's CPO30R BRA cement sales in the home market as identical sales in the months for which this is possible.

Citing section 771(15) of the Act, GCCC asserts that ordinary course of trade is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." GCCC cites the SAA at 834 and it states that an ordinary course of trade determination is based on whether "such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." Citing section 351.102 of the Department's regulations, GCCC argues that sales deemed to be outside the ordinary course of trade must have characteristics that are extraordinary for the market in question. GCCC also argues that the Department must examine all the circumstances surrounding a sale to make a determination that its sales of CPO30R BRA cement were made under extraordinary conditions.

With respect to the Department's comparison of sales volumes, GCCC cites NTN Corp. v. United States, 306 F. Supp. 2d 1319 (CIT 2004) (NTN Corp.) and asserts that the Department's past precedent has recognized that sales volume is not a persuasive indicator of whether sales are extraordinary. GCCC argues that because it only sold CPO30R BRA cement towards the end of the POR, it is distortive for the Department to compare the sales of CPO30R BRA cement to the total home-market sales during the POR. Likewise, GCCC also argues that comparing its sales volumes to CEMEX's sales volumes is distortive and unfair because of the

small size of GCCC's total home-market sales compared to those of CEMEX's.

GCCC contends that, because CPC 30R cement is a general, all-purpose cement and CPO30R BRA cement is normally only used for particular types of projects in the home market, it would follow that sales of CPC 30R cement would be much greater than sales of CPO30R BRA cement and that the smaller sales of CPO30R BRA cement relative to CPC 30R cement would not make sales of CPO30R BRA cement outside the ordinary course of trade.

Citing Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review, 68 FR 59366, and accompanying Issues and Decision Memorandum at Comment 1 (October 15, 2003), GCCC argues that at times it is more appropriate to compare the sales in question to quantities other than total quantities of all subject merchandise during the POR. GCCC asserts that, in this case, the more appropriate analysis would be on the basis of average-per-sale quantities sold to the same customers. GCCC asserts, therefore, that based on its analysis of average-per-sale quantities, the differences with respect to sales volumes are not significant and that the sales of CPO30R BRA cement are in the ordinary course of trade.

With respect to the Department's price comparisons, GCCC argues that the Department used distortive pricing comparisons as a basis for its conclusion that CPO30R BRA cement sales were outside the ordinary course of trade and excluded crucial evidence that supports a finding that the average net price of CPO30R BRA cement is not extraordinary. GCCC claims that the Department should have compared the average net price of CPO30R BRA cement with the average net price of CPC 30R cement made to the same customers because this comparison is not distortive and takes into consideration the greater purchasing power and the high levels of competition inherent in sales of CPO30R BRA cement. GCCC claims that comparing the

differences between the average net price of CPO30R BRA cement with the average net price of CPC 30R cement made to the same customers would demonstrate that sales of CPO30R BRA cement were not as significant as the Department's analysis makes them seem and certainly not extraordinary.

With respect to the Department's profit comparisons, GCCC claims that the Department compared the profits from sales of CPO 20 and sales of CPO30R BRA cement and concluded that, because they were significantly different, the same was true for profits from sales of CPO30R BRA cement and CPC 30R cement. GCCC argues that this conclusion is incorrect and that the Department should calculate profit as GCCC normally calculates profit in its ordinary course of business (i.e., based on the variable costs of manufacturing (not the fixed costs)) as the Department has done in Structural Steel Beams From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 69 FR 7200 (February 13, 2004). GCCC claims that, by using this methodology and the information it provided in its home-market-sales database, the profit margins for CPO30R BRA cement and CPC 30R cement are not extraordinarily different.

With respect to the Department's analysis of GCCC's customers, GCCC asserts that the Department's determination that strong competition produces aberrational sales is illogical and that, in fact, strong competition should be a hallmark of what constitutes ordinary course of trade. GCCC claims that producers often bid for projects with strong competition and that its customers of CPO30R BRA cement have a very competitive bidding process. GCCC argues further that this type of situation occurs often and is not an extraordinary condition, especially in the cement industry. GCCC also argues that the implications of the Department's determination are highly problematic and will create uncertainty for foreign producers in the future because most conduct

their business in free markets.

With respect to the Department's analysis of shipping distances and costs, GCCC states that, by relying on a comparison of the average freight cost per metric ton of CPO30R BRA cement and the average freight cost per metric ton of CPC 30R cement, the Department concluded that GCCC altered its normal distribution practices and, consequently, that its sales of CPO30R BRA cement did not represent sales made in normal market conditions.
GCCC argues that production and shipping decisions were based on the most cost-effective and profitable practices possible. GCCC argues further that the shipping costs for CPO30R BRA cement were entirely consistent with the shipping costs for sales of CPC 30R cement over the same distance.

GCCC contends, therefore, that it did not alter its normal distribution practices and that its production and shipping arrangements for CPO30R BRA cement were made under normal market conditions and within the ordinary course of trade.

The petitioner argues that the Department correctly determined that GCCC's unusual and unrepresentative sales of CPO30R BRA cement should be excluded from the calculation of normal value because they were outside the normal course of trade. The petitioner claims that the evidence indicates that GCCC carried out a scheme to artificially deflate normal value and thereby decrease the dumping margin.

The petitioner argues that the Department correctly observed that, in order to determine whether sales were made outside the ordinary course of trade, it must consider whether certain home-market sales of cement were ordinary in comparison with other home-market sales of cement. The petitioner argues that, even if GCCC made its sales of CPO30R BRA cement

during the POR under conditions that are normal for sales of CPO30R BRA cement and had sound business reasons for its decisions on production and shipping arrangements, its sales of CPO30R BRA cement during the POR would not necessarily be within the ordinary course of trade.

The petitioner argues that GCCC's sales of CPO30R BRA cement are not representative of its sales of cement in the home market for various reasons. The petitioner contends that there is no genuine demand for CPO30R BRA cement because GCCC did not begin selling it until the end of the thirteenth review. The petitioner also argues that, if there was a genuine demand for CPO30R BRA cement, it would be reasonable to expect that a market for this type of cement would have existed in prior reviews.

The petitioner cites GCCC's verification exhibit 6, at page 3, and asserts that, based on how GCCC and its customers normally refer to the product in documentation on the record, it is clear that they do not consider it to be a product that is normally sold in the home market.

The petitioner also alleges that it appears that GCCC's home-market sales of CPO30R BRA cement were overrun sales of Type II LA cement for the U.S. market.

The petitioner asserts that GCCC's sales of CPO30R BRA cement were restricted to a small and unrepresentative group of customers. Citing Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea (62 FR 18404, 18437 (1997)), the petitioner argues that the Department has relied on the number of customers as a factor in determining whether sales are outside the ordinary course of trade. The petitioner also argues that the record indicates that both the number and the nature of its customers of CPO30R BRA cement are not representative of sales of cement generally made in the home market.

The petitioner argues that GCCC's customers for CPO30R BRA cement abruptly shifted from buying CPC 30R cement. The petitioner mentions one sale of CPO30R BRA cement which was originally for CPC 30R cement but amended such that GCCC sold CPO30R BRA cement at a lower price. The petitioner argues further that the more logical explanation for the switch from CPC 30R cement to CPO30R BRA cement by GCCC's customers was that GCCC was trying to lower its dumping margin by unloading overruns of Type II cement originally destined for the United States.

The petitioner contends that the sales process for CPO30R BRA cement was very different than for other sales of cement in the home market. In particular, the petitioner mentions that there were no rebates, discounts, or tariffs for sales of CPO30R BRA cement and that the sales were the result of a public bidding process.

Citing Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404 (April 15, 1997), the petitioner claims that the Department and the courts frequently have relied upon low relative sales volumes as a factor in determining whether sales are outside the ordinary course of trade. The petitioner argues, therefore, that the Department was correct in comparing the sales volumes of CPO30R BRA cement and CPC 30R cement for purposes of determining whether such sales are outside the ordinary course of trade.

The petitioner asserts that the Department should strike from the record GCCC's June 8, 2004, submission because it was submitted after the deadline for new factual information and because it was improperly introduced at verification on account that the information related to sales of CPO30R BRA cement after the POR.

The petitioner rebuts GCCC's claim that the Department should not compare GCCC's sales of CPO30R BRA cement to CEMEX's total home-market sales because, according to the petitioner, there is no more appropriate comparison of sales volumes than that of collapsed affiliates. Furthermore, the petitioner argues that, even without considering CEMEX's home-market sales, the result would be the same when you compare GCCC's sales of CPO30R BRA cement to its overall home-market sales.

The petitioner argues that GCCC provides no justification as to why the Department should compare the sales volumes on the basis of average-per-sale quantities sold to the same customer instead of comparing total sales quantities as is normally done by the Department. The petitioner argues further that, even if the Department were to use this basis to compare sales volumes, it would arrive at the same result because it demonstrates the unusual nature of these sales.

Citing Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 FR 29553 (June 5, 1995), the petitioner claims that the Department has relied upon differences in pricing to determine whether sales were outside the ordinary course of trade in other proceedings and has recognized this factor has greater importance when the production costs of the products being compared are very similar. The petitioner, therefore, argues that the Department correctly considered the price comparison in determining whether sales were outside the ordinary course of trade.

The petitioner argues that GCCC's claim that the Department ignored the commercial realities of its sales of CPO30R BRA cement is misplaced because the Department must compare GCCC's sales of CPO30R BRA cement to its sales of CPC 30R cement not whether its sales of

CPO30R BRA cement are normal for sales of CPO30R BRA cement.

The petitioner argues that GCCC provides no justification for its argument that a more appropriate comparison for purposes of determining whether CPO30R BRA cement sales are outside the ordinary course of trade is to compare the average net price of CPO30R BRA cement sales to the average net price of CPC 30R cement sales made to the same customers. The petitioner argues further that, even if the Department were to use this basis to compare prices, it would arrive at the same result.

Citing Mantex Inc. v. United States, 841 F. Supp 1290, 1308 (CIT 1993), the petitioner asserts that the Department and the courts consistently have found relative profitability to be a relevant factor in determining whether sales are outside the ordinary course of trade. The petitioner also asserts that GCCC does not contest that there is a significant difference in profit between its sales of CPO30R BRA cement and its sales of CPC 30R cement using the Department's traditional profit-calculation methodology but proposes an alternative method for calculating profit which is favorable to GCCC. The petitioner argues that GCCC's method is inappropriate because it excludes certain pertinent components and because it is not based on the entire POR. The petitioner, thus, argues that the Department is correct in relying on its comparison of profitability.

The petitioner claims that GCCC's shipping arrangements for sales of CPO30R BRA cement are highly unusual and that the Department was correct in concluding that, because GCCC altered its normal distribution practices for CPO30R BRA cement, those sales did not represent sales made in normal market conditions. Citing CEMEX, S.A. v. United States, 19 CIT 587 (1995), the petitioner asserts that the Department and the courts have long recognized

that differences in shipping arrangements are an important factor in determining whether home-market sales are within the ordinary course of trade, particularly with respect to cement.

The petitioner asserts that GCCC implemented a new practice during the POR with respect to its shipping arrangements and that this change was implemented in a disparate manner that resulted in shipping arrangements for sales of CPO30R BRA cement that were highly unusual compared with arrangements for all sales prior to the POR as well as with arrangements of sales of CPC 30R cement during the POR.

The petitioner states that GCCC's shipments of CPO30R BRA cement were shipped over unusual distances and mentions that the Department found that over 90 percent of the total sales quantity of CPO30R BRA cement was sold in the region usually served by GCCC's Chihuahua plant. The petitioner highlights the importance of shipping distances and costs to the cement industry and argues that the industry practice is to limit the shipping distance to 150 miles. Thus, the petitioner claims that GCCC's shipping practices are very suspect when judged by the normal practice in Mexico.

The petitioner states that, even if GCCC had a rational, market-driven explanation for the shipping distances for sales of CPO30R BRA cement, it does not alter the fact that its shipping arrangements for sales of CPO30R BRA cement are unusual compared with its shipping arrangements of other sales and, therefore, outside the ordinary course of trade. Finally, the petitioner asserts that it is irrelevant whether GCCC paid similar freight charges for shipping CPO30R BRA cement as it did for shipping CPC 30R cement over similar distances.

The petitioner argues further that, GCCC's freight expenses for sales of CPO30R BRA cement are the direct result of its unusual shipping arrangements and that, in comparison to those

freight expenses for sales of CPC 30R cement and, therefore, outside the ordinary course of trade.

Department's Position: Section 773(a)(1)(B) of the Act states, in part, that normal value is "the price at which the foreign like product is first sold (or, in absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." The term "ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." The SAA clarifies this portion of the statute further when it states: "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." See SAA at 834. Thus, the statute and the SAA are clear that a determination of whether sales (other than those specifically addressed in section 771(15) of the Act) are within the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market. In this case, the sales in question are CPO30R BRA cement and, as discussed in the Ordinary Course of Trade Memorandum for the Preliminary Results of the 2002/2003 Administrative Review of the Antidumping Duty Order on Gray Portland Cement and Clinker from Mexico, dated June 14, 2004 (OCT Memo), we compared these sales to sales of other types of cement (i.e., CPC 30R, CPO 20, CPO 40, and CPC 40) sold in the home-market during the POR.

As discussed further in the OCT Memo, the Department has discretion to choose how

best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade. See OCT Memo at page 2. In making our ordinary-course-of-trade determination for various segments of this proceeding, we have considered, inter alia, shipping distances and costs, sales volume, profit levels, sales history, home-market demand, and the promotional aspect of sales. See the petitioner's January 20, 2004, factual submission, appendices 5 and 7. For purposes of determining whether the respondent's sales of CPO30R BRA cement during the instant POR were made in the ordinary course of trade, we evaluated the totality of circumstances surrounding these sales.

With respect to sales volume, we found that, based on a comparison of the total sales quantity of CPO30R BRA cement and the home-market sales of CEMEX and GCCC, the sales of CPO30R BRA cement were not representative of the respondent's normal course of sales of cement. For a discussion of the proprietary arguments presented and the proprietary information used in this determination, see the OCT Memo, at page 3 and the Final Analysis Memo. We disagree with GCCC's argument that sales volumes have limited utility in making an ordinary course of trade determination. The case cited by GCCC (NTN Corp.) does not state or imply that sales volumes have limited utility. Rather, the Department argued (and the CIT affirmed its argument) in that case that merely labeling sales as samples that are in small quantities does not require them to be treated as sample sales absent a demonstration that the sales were not representative of home-market sales. See NTN Corp., 306 F. Supp. 2d at 1345. While we agree that low sales volume alone would not make sales outside the ordinary course of trade, in this case we relied on sales volume as one of many important factors in making our ordinary course of trade determination. See Thai Pineapple Public Co. v. United States, 946 F. Supp.11, 16 (CIT

1996), CEMEX, S.A. v. United States, 133 F.3d 897, 901 (CAFC 1998), and Bergerac v. United States, 102 F. Supp. 2d 497, 509 (CIT 2000).

We disagree with GCCC that the Department should compare sales volumes on the basis of average-per-sale quantities sold to the same customer rather than comparing the total sales volumes during the POR. In addition, we also disagree with GCCC that we should segment the POR into several periods to do our analysis. We find that the best way to compare the sales of CPO30R BRA cement to the sales or transactions generally made in the same market is to look at the total sales quantity of the product in question during the period under examination. We have followed this methodology in several cases and find that GCCC has provided no justification to change it in this proceeding. See Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 66 FR 14889 (March 14, 2001) and Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 FR 29553 (June 5, 1995) (Pineapple Final).

Even if we accept GCCC's argument that we should compare sales volumes on the basis of average-per-sale quantities sold to the same customer, we find that its sales of CPO30R BRA cement are unusual. For further information, see Final Analysis Memo, page 11. Moreover, for the final results of review, we found that comparing GCCC's total sales volume of CPO30R BRA cement to the total sales volume of CPC 30R cement made to the same customer demonstrates further that sales of the CPO30R BRA cement are unusual. For further information, see Final Analysis Memo, page 11.

We also disagree with GCCC's argument that the Department should exclude CEMEX's total home-market sales from comparison to the sales of CPO30R BRA cement because we

consider GCCC and CEMEX to be one entity. Nonetheless, even without CEMEX's home-market sales, we find that GCCC's sales of CPO30R BRA cement are not made in the ordinary course of trade based on GCCC's home-market sales. See OCT Memo, at page 3.

With respect to the price comparisons, we compared the price of CPO30R BRA cement to the price of other types of cement (CPC 30R, CPO 20, and CPO 40) sold in the home market and found that the prices for sales of CPO30R BRA cement were not comparable to the prices of other cement types. For more details on the proprietary information used to make this determination, see the OCT Memo, at page 4.

We are not convinced by GCCC's argument that it would be more appropriate to compare the average net price of CPO30R BRA cement to the average net prices of the other products sold in the home market to the same customers (GCCC asserts that this method would consider the purchasing power and high levels of competition inherent in sales of CPO30R BRA cement). GCCC has not articulated how competition or purchasing power would be more appropriately weighed by such an analysis or how such factors could be singled out from the many other variables (e.g., supply and demand) that affect pricing decisions. Further, GCCC has not provided a clear or convincing argument as to why it is more appropriate to compare sales of CPO30R BRA cement with sales of CPC 30R cement that have the same customer. As explained above, we find that the more appropriate way of comparing sales of CPO30R BRA cement to the sales or transactions generally made in the same market is to look at all the sales prices for similar merchandise sold in the home market. We have followed this methodology in several other cases and this methodology has been upheld by the CIT. See Pineapple Final, Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final

Results of Antidumping Duty Administrative Reviews, 62 FR 18404 (April 15, 1997), and Murata v. United States, 820 F. Supp. 603, 606 (CIT 1993). We also find that our methodology is reasonable because we are comparing sales of CPO30R BRA cement to other similar subject merchandise sold in the home market during the POR. Overall, GCCC did not provide persuasive arguments as to why our methodology is distortive. Moreover, to test GCCC's theory for the final results of review, we compared the net price of sales of CPO30R BRA cement to the net price of sales of CPC 30R cement by GCCC for the same customer category and found that GCCC's sales of CPO30R BRA cement have characteristics that are not ordinary. For further information, see Final Analysis Memo, page 12.

With respect to profit, the Department examined the profitability of CPC 30R cement, CPO 20, and CPO 40 in comparison to the profitability of CPO30R BRA cement and found that sales of CPO30R BRA cement were not ordinary. For a discussion of the proprietary information used in this analysis, see OCT Memo, at pages 4-5. We disagree with GCCC's assertion that the Department should use the methodology that it uses in its normal course of business to calculate profit. We find that the traditional profit-calculation methodology we used in our analysis is reasonable and more appropriate because it considers the entire POR, prices and expenses as reported by GCCC, and certain other components GCCC neglected to use in its recommended methodology. For further information, see Final Analysis Memo, at page 13.

With respect to GCCC's customers and sales history, we find that we correctly determined that, because of the characteristics of GCCC's sales of CPO30R BRA cement, GCCC's sales of CPO30R BRA cement did not represent sales based on normal market conditions. For a discussion of these proprietary characteristics, see the OCT Memo, at page 6.

We agree with the petitioner that the group of customers that bought CPO30R BRA cement from GCCC was small and unrepresentative in comparison to all of GCCC's home-market customers and that the sales process of sales of CPO30R BRA cement was different than the sales process of most of GCCC's sales in the home market. These differences are discussed in the OCT Memo, at pages 5-6.

We disagree with GCCC's argument that the Department determined that strong competition produces aberrational sales and that such a determination is irrational and would have problematic implications in future proceedings. The Department did not determine that strong competition alone would result in sales outside the ordinary course of trade. Rather, we determined that strong competition in combination with several other factors substantiated that GCCC's sales of CPO30R BRA cement do not represent sales based on normal market conditions. See OCT Memo, pages 5-6 and the Final Analysis Memo, page 13.

With respect to shipping, as discussed in the OCT Memo, we continue to find that GCCC's sales of CPO30R BRA cement did not represent sales made under normal market conditions because it altered its normal distribution practices. See OCT Memo, pages 6 and 7. Therefore, we continue to find that GCCC's shipping arrangements for sales of CPO30R BRA cement are unusual.

With respect to the petitioner's July 10, 2004, request that certain information should be excluded from the record, we find that GCCC's June 8, 2004, submission should not be excluded from the record. The fact that the information concerned sales of CPO30R BRA cement subsequent to the POR is not grounds to reject the information. Further, GCCC submitted the information in response to a prior submission by the petitioner and, therefore, the deadline for

new factual information is inapplicable. Although it was submitted shortly after the deadline to respond to the petitioner's comments, we have decided to consider GCCC's June 8, 2004, submission in this review.

Based on our examination of all the relevant factors specific to the sales in question, we continue to find that GCCC's sales of CPO30R BRA cement outside the ordinary course of trade.

Comment 8. Ministerial Errors

a. Difference-in-merchandise Adjustment (DIFMER)

The petitioner asserts that the Department based its DIFMER calculation on the data in GCCC's November 20, 2003, questionnaire response. According to the petitioner, however, GCCC revised its variable cost of manufacture information as a result of the home-market verification conducted by the Department. The petitioner requests that the Department calculate the DIFMER based on GCCC's post-verification information for the final results.

The respondent did not respond to this comment.

Department's Position: We have reviewed the record and agree with the petitioner's assertion. Therefore, for the final results of this administrative review, we calculated the DIFMER using information from GCCC's post-verification database. For further details, see the Final Analysis Memo.

b. Exchange Rate Error

In their case briefs, CEMEX and GCCC assert that the preliminary results margin-calculation program contains an error that limits the quantity and value of U.S. sales. CEMEX and GCCC contend that at the point in the margin-calculation program where the exchange rate data from the Department's exchange rate database was incorporated, the number of observations

decreased significantly, suggesting that the program inadvertently dropped a significant number of U.S. sales observations. CEMEX and GCCC request that the Department correct this error for the final results of this administrative review.

The petitioner agrees with both CEMEX's and GCCC's assertion and requests that the Department correct this error for the final results.

Department's Position: We have reviewed the margin-calculation program and agree with the parties that an error occurred with the exchange rate file. Therefore, we have corrected this error for the final results of this administrative review.

c. Interest Revenue

In its case brief, GCCC argues that, in the Preliminary Results, the Department did not include the interest revenue for the relevant U.S. sales. According to GCCC, it explained in its Section B questionnaire response that it reported the transaction specific amount of interest revenue that it received from customers for late payment. GCCC requests that we correct this error for the final results and that we follow its recommended methodology for applying the interest revenue to the particular sales for which this amount was reported.

The petitioner states that it agrees with GCCC that the Department should correct this error but disagrees with GCCC's proposed methodology. The petitioner argues that GCCC proposed methodology would improperly treat interest revenue as a direct selling expense, rather than a revenue item. The petitioner, therefore, proposes a different methodology to correct this error.

Department's Position: We agree with GCCC and the petitioner that we should correct this error for the final results of this administrative review. In addition, we agree with the

petitioner's proposed methodology for correcting this error. For further details, see Final Analysis Memo.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margin for the reviewed firm in the Federal Register.

Agree _____ Disagree _____

_____
James J. Jochum
Assistant Secretary
for Import Administration

_____
Date